Filed 9/14/15 P. v. Fuller CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RANDY ERIC FULLER, Defendant and Appellant.	E061193 (Super.Ct.No. RIF101296) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Reversed and remanded with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In 2003, defendant and appellant Randy Eric Fuller was convicted of second degree robbery (Pen. Code, § 211)[1] and driving in wanton disregard for safety while fleeing police (Veh. Code, § 2800.2, subd. (a)).[2] After striking one of defendant's prior offenses, the trial court found true allegations that defendant had two other prior strike convictions. Invoking the three strikes law as it existed at the time of sentencing, the court sentenced defendant to a total of 60 years to life in state prison. The sentence was comprised of 25 years to life on each of the felony counts and a five-year enhancement for each of the prior strikes. (Pen. Code, § 667, subd. (a).) The two 25-year-to-life terms were to run consecutively.

After the passage of the Three Strikes Reform Act of 2012, added by Proposition 36 (as approved by voters, Gen. Elec. (Nov. 6, 2012)) (the Reform Act), defendant[3] petitioned the court for recall of his original sentence and resentencing. (§ 1170.126, subd. (b).) The trial court found defendant ineligible for relief because he had been convicted of robbery, which is a "serious" or "violent" felony for resentencing purposes. (§§ 1170.126, subd. (b), 667.5, subd. (c)(9), 1192.7, subd. (c)(19).)

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

[2] Defendant was also convicted of misdemeanor assault with a deadly weapon other than a firearm (Pen. Code, § 245) and driving without a license (Veh. Code, § 12500, subd. (a)). As these misdemeanor convictions are irrelevant to this appeal, we do not discuss them further.

[3] Defendant was proceeding without counsel at the time.

The Office of the Public Defender then filed a motion for reconsideration on defendant's behalf. It clarified that defendant was only requesting resentencing as to the Vehicle Code conviction, which is not considered a serious or violent felony. (§ 1170.126, subd. (b)). Defendant acknowledged he was not seeking relief as to the sentence for robbery, which is a serious or violent felony. (§§ 1170.126, subd. (b), 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) The court denied the motion for reconsideration. Relying on a recent case, *Braziel v. Superior Court* (2014) 225 Cal.App.4th 933, review granted July 30, 2014, S218503, it found that defendant's conviction for the serious or violent felony of robbery barred him from seeking resentencing on any count.

On appeal, defendant contends the trial court erred in finding him ineligible for resentencing on a nonserious, nonviolent felony because one of his prior convictions was for a violent or serious felony. He asks us to adopt the reasoning of *In re Machado* (2014) 226 Cal.App.4th 1044, review granted July 30, 2014, S219819, which disagreed with *Braziel* and held that resentencing could occur piecemeal, or on a count-by-count basis, if a defendant had one conviction for a serious or violent felony and one conviction for a felony that is neither serious nor violent.

Since the briefing on this appeal occurred, the California Supreme Court decided *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), decided July 2, 2015. That case adopted defendant's position regarding piecemeal resentencing. We therefore reverse the order on his resentencing petition and remand for further proceedings on that request.

DISCUSSION

The Reform Act enacted section 1170.126, which permits persons currently serving an indeterminate life term under the three strikes law to petition the sentencing court for a new, determinate sentence that would essentially treat the successful petitioner as a second striker. (§ 1170.126, subd. (f).) Subdivision (e) of section 1170.126 indicates resentencing may be appropriate for a defendant meeting the following criteria: (1) he or she is serving an indeterminate sentence for a felony that is neither serious nor violent; (2) the current sentence was not imposed for certain disqualifying offenses, including certain drug charges, sex offenses, or crimes involving the use of a deadly weapon or an intent to cause great bodily harm; and (3) none of the defendant's prior convictions were for specified crimes, including certain sex offenses, felonies punishable by life imprisonment or death, homicide crimes, and certain assaults on peace officers.

This appeal asks us to interpret section 1170.126, which sets forth the procedure for requesting resentencing under the Reform Act. We employ de novo review when construing statutes. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) Because the Reform Act was enacted by voter initiative, " 'our task is ascertaining the intent of the voters,' which ' "is the paramount consideration." ' " (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 172.)

Moreover, in this case, our analysis is guided by *Johnson*, which undertook the same statutory interpretation in which defendant now asks us to engage. As relevant to this case, *Johnson*'s main holding was: "In sum, section 1170.126 is ambiguous as to

whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous." (*Johnson*, *supra*, 61 Cal.4th at pp. 694-695.)

Applying the rule from *Johnson* to this case, we find the trial court erred when it denied defendant's request for resentencing solely on the ground that one of his convictions was for a serious or violent felony. We reverse and remand accordingly.

DISPOSITION

The denial of defendant's request for resentencing is reversed. The matter is remanded with instructions to consider defendant's request for resentencing in light of this opinion and of *Johnson*.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.